United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-7205

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

B

P/S

IMAGE CARRIER CORPORATION,
Plaintiff-Respondent.

—against—

ABRAHAM D. BEAME,
Mayor of New York City, *et al.*,
Defendants-Appellants.

HOUSE OF LITHOGRAPHY, INC., *et al.*,
Plaintiffs-Respondents,

—against—

ABRAHAM D. BEAME,
Mayor of New York City, *et al.*,
Defendants-Appellants.

UNITED STATES COURT OF APPEALS
FILED
JUL 20 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

PLAINTIFFS-RESPONDENTS BRIEF

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THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

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PLAINTIFFS-RESPONDENTS BRIEF

QUESTIONS PRESENTED

I. Do Respondents have standing to sue?

II. Can the Appellants arbitrarily preclude open shop printers in the city of New York from bidding on and being awarded City printing contracts financed by New York taxpayers solely because of their status as non-union printers?

III. Does federal labor law pre-empt the practices of the Appellants requiring that printing contracts be awarded only to companies able to exhibit the union label?

STATEMENT OF THE CASE

The Respondents adopt the statement of the case contained in Intervenor-Appellant's brief on pages two through four.

STATEMENT OF FACTS

On April 12, 1934, the City of New York, pursuant to Executive Order of Mayor LaGuardia (182a),* adopted a policy of restricting the awarding of all City printing contracts, except for the printing of letterhead and envelopes, to only those City printing establishments unionized by one of the member unions of the Allied Printing Trades Council of the City of New York. The purpose of the Mayoral Order was expressly stated in its preamble:

> "Resolved, that in order to lend the greatest measure of aid and assistance during the present economic depression to those citizens of our City engaged in the various branches of the printing industry, the following provisions be made a part of each and every contract and open market order issued by the Board of City Record;"

To this end, the Order goes on to state:

> "1. That all printed forms hereafter purchased for the use of the City of New York by the Board of City Record shall bear the label of the Allied Printing Trades Council of the City of New York. This rule shall not apply to letterheads and envelopes.
>
> 2. That all bidders be required to certify they operate a union plant and pay the prevailing rate of wages in all divisions of their establishment. . .[1]

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*Numbers in parenthesis followed by the letter "a" reference pages of the Appendix.

[1]The record below contains no other express history concerning the underlying purpose of the Mayoral Order, nor have the appellants or intervenor brought forth any additional Executive history concerning this policy.

Pursuant to this Mayoral Order, all printing contracts, with the above-noted exceptions, i.e. letterheads and envelopes, solicited and awarded by the City subsequent to the effective date of the Order (April 20, 1934), have been awarded only to those printing establishments which are authorized to display the union label on their printed material (125a).[2] Thus, from 1934 until the present, all flat forms, cards, booklets and pamphlets published by the City must have been printed by a union shop (114a, 133a).

In order to comply with this 43-year-old restrictive procurement policy, the appellant City Agencies have included in their solicitations to bid the specific requirement that work must be performed in a unionized facility and that such work, with the exception of "letterheads, noteheads, and envelopes", must bear the union label.

In its Supplement to Standard Instructions to Bidders (171a), the New York City Department of Purchase includes the language:

> 5. UNION LABEL. Unless otherwise specified in the schedule, *all work* must be done in a union printing plant located within the City of New York. The union label must appear on all of the forms required under this contract, except letterheads, noteheads and envelopes. (173a)

Almost identical language is contained in paragraph 13 of the Board of Education's Bid Invitation for Jobs of $5,000 or Less (190a):

> 27. Unless otherwise specified, all printing required by this contract except envelopes, must be done in a printing plant located within the City

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[2]Under the terms of the Mayoral Order, even in those instances where the union label is not required, i.e. letterheads and envelopes, the work must presumably still be performed in a union shop. The Standard Instructions to Bidder published by the City Department of Purchase reconfirms this additional restriction.

> of New York. The union label must appear on all of the forms required under this contract, except letterheads, noteheads and envelopes.

Likewise, the New York City Health and Hospital Corporation, in a memo dated December 3, 1971 (200a), formally adopted the New York City Department of Purchase procedures for the awarding of printing contracts. In relevant part, this memo provides:

> . . . The Health and Hospital Corporation will follow the procedure established by the New York City Department of Purchase in which letterpress or offset printing and all accessory operations as required will be done in a union printing plant located within the City of New York. The union label must appear on all printing except letterheads and noteheads.
>
> This policy applies to the hospitals as well as central office procurement.

In order to facilitate the union label printing restriction, the Department of Purchase compiles a list of union printers and formal letter notice of bids on City printing contracts are thereafter mailed exclusively to this class of potential bidders (115a-116a). The City Health and Hospital Corporation compiles a similar list (133a). The Board of Education, although allowing any printing establishment to be placed on its mailing list, advises non-union printers that, even if they were to submit the low bid, such bid would be rejected as not being in compliance with the union label restriction (128a).

Pursuant to New York City Board of Estimate Regulations, City Agencies must determine that a successful bidder is, in fact, qualified to perform the work in question (121a). The inspection is bifurcated, one part concerning the financial soundness of the company and the other part concerning whether or not a company has the necessary machines and materials requisite to successful completion

of the particular job (121a). No non-union printer has ever been inspected by any of the appellant Agencies (124a). Indeed, in only a few instances (2 to 3 percent of contracts) do appellant Agencies ever bother to inspect union printers (123a).

As a general rule, the types of printing work awarded by the appellant Agencies are simple and non-complicated. According to Mr. Ed Blank,[3] Director of Printing Management of Printing Industries of Metropolitan New York, New York City's largest printing trade association which is composed of both union and non-union printing companies, the City normally has no need for multi-color work or work requiring good register or creative fancy scheming of impositions and layouts (156a). Mr. Blank further testified that most of the printing work awarded by the appellants is generally one-sheet work or booklets and can be done on the simplest and smallest type of printing equipment (157a).

Mr. Blank testified, without challenge or contradiction, that the ability to display the union label provides absolutely no assurance that the work performed will be of top quality or that it will be superior to similar work performed in a non-union shop (155a). According to Mr. Blank, the fact that one is unionized and the other is not, has no bearing on the type or quality of work likely to be

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[3]Mr. Blank was the only expert witness to testify at the proceedings below (150a). Contrary to the Intervenor's consistent misassertions, Mr. Blank is not a representative of a non-union trade association (I-10), nor is he "Director of Printing Management of Master Printers of America" (I-16). As the record clearly indicates, Mr. Blank serves as Director of Printing Management for Printing Industries of Metropolitan New York, a trade association comprised of both union and non-union members (148a, 149a). In his capacity as Director of Printing Management of Printing Industries of Metropolitan New York, Mr. Blank regularly consults with both union and non-union printers and inspects both union and non-union printing establishments (149a).

performed (150a-151a). Mr. Blank further observed that in order to assure high levels of quality and employee productivity (150a), both union and non-union printers must have good management, up-to-date technology, and well-trained employees, and that the question of union or non-union status plays no part in the achievement of these goals.[4]

The Respondents, Associated Litho and Lettering Service, Inc., House of Lithography, Inc., and Image Carrier Corporation, are all non-union printing establishments, each of

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[4]Indeed, according to Mr. Blank, if there are any advantages from the customers' standpoint in dealing with a union viz-a-viz a non-union printer, they would appear to be in favor of dealing with the latter. Foremost among the reasons cited for this by Mr. Blank is that because of restrictions typically contained in union contracts, a non-union printer can deliver high quality work at a lower price than his unionized counterpart. This cost differential is not necessarily due to the relative wages of union and non-union employees, since, in many instances, non-union employees make more than employees of union printers (155a), but rather to the manning requirements and work rules restricting management of union printing establishments.

The employees of a unionized printer are often represented by a number of different unions, such representation being contingent upon the type of job the particular employee performs. Thus, pressroom employees may be represented by one union and composition-room employee by another. If any employee must sit idle because of a lack of work in his particular job classification, the customer must still pay the employee's hourly wage rate. Union work rules will not allow the idle employee to be transferred to another department where there may be a need for his services (159a). Further, the customer must pay for the overtime other employees may have to work in order to complete the job in their departments. Such overtime in many instances may be over twice the normal hourly wage rate (160a).

A non-union printer is not saddled with the above-mentioned job transfer inflexibility. Employees may be moved from job to job, depending on the status of the printing process (159a). This flexibility not only assures a minimum of employee idle time, but also has the added beneficial effect of giving the non-union employee a knowledge of the entire printing process (159a).

whom is capable of doing many of the types of work for which appellant Agencies normally contract, but who are excluded from bidding on city printing contracts under the aforementioned policy (109a, 135a, 145a, 166a). In fact, each of the respondents have performed similar work for both private and public sector clients (109a, 135a, 142a).

Joel Weiss, President of Associated Litho and Lettering Service, testified that his company had successfully completed work for Time, Inc., Swissair, National Health Council, the President's Council on Physical Fitness and Sports, and The President's Council on Environmental Quality. Mr. Weiss stated that, although his company was capable of performing many of the types of work required by the City of New York, it refrained from bidding on these jobs because of the City's avowed union label requirement (109a). Associated Litho and Lettering Service's ability to perform the type of printing work normally contracted by the City was confirmed by Mr. Blank, who, having had the occasion to inspect Associated Litho and Lettering's printing establishment, was of the opinion that the Company was well qualified to do certain types of work required by the City of New York (165a-166a).

Testimony similar to Mr. Weiss' was presented by Mitchell Morganstern, Secretary/Treasurer of House of Lithography, Inc., a company which regularly performs work for such recognized clients as Sony, Renfield Importers, The Irish Tourist Board and the New York Telephone Company (134a-136a). As in the case of Associated Litho and Lettering, although capable of performing some types of work required by the City, House of Lithography has been foreclosed from bidding on City printing contracts due to its inability to display the union label (136a).[5]

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[5]House of Lithography's ineligibility to bid on City printing contracts was exemplified when, subsequent to the receipt of an invitation to bid

(continued)

Similar testimony was presented by Lee Slater, President of Image Carrier Corporation. Mr. Slater testified that, while his company had been certified by the State of New York as a company qualified to bid on State printing contracts (143a, 144a), as is the case with Associated Litho and Lettering and House of Lithography, Image Carrier Corporation has been prevented from bidding on City printing contracts because of the union label requirement (144a, 145a). Mr. Slater further testified that his company also performs work for such private clients as Touche-Ross, RCA, Amstar, and Scholastic Magazine (142a).

Essentially, the facts are clear and undisputed. The City has promulgated, implemented and enforced a policy of restricting most printing contracts for the City of New York to companies who are authorized to affix the union label.[6] This policy has been in effect since 1934 and has served to exclude all open shop printing establishments like the Respondents' from bidding on City printing projects covered by the policy.[7] Respondents, although fully

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[5](continued)
on work for a community school project, the Company, in response to its inquiry concerning the union label requirement, was advised by the community school superintendent that the union label requirement was absolutely essential and must be adhered to in order to successfully bid on the work specified in the bid invitation (137a-138a).

[6]Indeed, the City, in its brief, concedes this fact.

[7]It should be noted that open shop printers comprise a substantial segment of the printing establishments in New York City. Indeed, as Mr. Blank testified, non-union printers now comprise a majority (350 open shop employers, 250 union shop employers) of the membership of Printing Industries of Metropolitan New York, the largest printing trade association in the City (150a). Further, the trend is toward an increasing open shop majority (150a). Consequently, an increasing number of printing establishments are being deprived of the opportunity to perform work for the City and correspondingly, the City is being deprived of the opportunity to enhance the competitive bidding process, thereby decreasing its costs.

qualified to perform the type of printing work for which the City normally contracts, have, as a result of the enforcement of the policy, been denied the right to bid on such projects. The sole question which is now before this Court is the legality of the City policy which openly and admittedly discriminates against open shop printing establishments within the City of New York, solely because of their status as open shop printers.

ARGUMENT

I. THE RECORD BELOW CLEARLY ESTABLISHES RESPONDENTS' STANDING TO BRING THIS ACTION AND DEMONSTRATES THEIR RIGHT TO OBTAIN JUDICIAL RELIEF

The record below demonstrates that the dispute before this Court is a "case or controversy" within the meaning of Article III of the United States Constitution and clearly indicates that each of the Respondents has such a personal stake in the outcome of the controversy as to warrant the invocation of Federal Court jurisdiction pursuant to 42 U.S.C. 1983 and 28 U.S.C. 1343(3), and to justify the exercise of this Court's remedial powers in their behalf. *Warth v. Selden*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed. 2d 343 (1975); *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed. 2d 663 (1962).

Each of the Respondents has established that the Appellants' restrictive bidding and contracting procedures concerning display of the union label have denied them the opportunity to bid on City printing contracts for work which they were otherwise capable of performing (109a, 135a, 142a, 165a, 166a).

The Intervenors rely upon *Warth v. Seldon, supra*, for their contention that the status of "potential bidder" is not sufficient to confer standing to sue. Such a reliance is misplaced, misconstrues the holding of the Court and inexplicably disregards the important language contained in

footnote 18 of the Court's decision. In *Warth*, the Court held:

> We hold only that a plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harm him, and that he personally would benefit in a tangible way from the court's intervention.[18] 422 U.S. at 508, 95 S.Ct. at 2210, 45 L.Ed. 2d at 360.

Footnote 18 of the Court's decision in *Warth* provides:

> This is not to say that the plaintiff who challenges a zoning ordinance or zoning practices must have a present contractual interest in a particular project. A particularized personal interest may be shown in various ways, which we need not undertake to identify in the abstract.... *Id.*

Ignoring the above language, the Intervenors construe *Warth* to imply that since none of the Respondents have ever successfully bid on a City printing job, the Respondents have not suffered a demonstrable particularized injury. Concomitantly, the Intervenors argue further that the Respondents do not have the necessary manpower to successfully complete City printing projects and, accordingly, judicial intervention would not individually benefit any of the Respondents in a tangible way.

As the Court in *Warth* noted: "A particularized personal interest may be shown in various ways." The fact that the Respondents have never successfully submitted a bid on a City printing contract subject to a union label requirement simply cannot be used as *prima facie* evidence that the Respondents do not have such a particularized personal interest.[8] All three Respondents testified that the reason that

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[8]In its recent decision in *Dothard v. Rawlinson*, 45 U.S.L.W. 4888 (1977) the Supreme Court, in upholding a District Court finding that

(continued)

they did not bid on City contracts was that to submit such a bid would have been useless in light of the City's well-known restrictive union label requirement, a requirement with which none of the Respondents were capable of complying (109a, 136a, 144a). Further, two of the Respondents, Image Carrier Corp. and House of Lithography, did, in fact, attempt to submit bids on certain City contracts. However, after obtaining the necessary forms, each was personally informed that its bid could and would not be accepted because of their inability to comply with the City's union label requirement (138a, 144a).

The above facts alone demonstrate that the City's practice of restricting the awarding of printing contracts exclusively to union printers directly and immediately injures the Respondents within the meaning of the prohibitions contained in 42 U.S.C. 1983. But for the City's arbitrary union label requirement, Respondents would have an opportunity to bid upon and be awarded City printing contracts. The foreclosure of the opportunity to successfully bid upon and be awarded City printing contracts results in legal injuries sufficient to establish standing of the Respon-

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[8](continued)
finding that State-imposed height and weight standards for prison guards had a discriminatory impact on female applicants, rejected the State's contention that a *prima facie* case should not be premised on generalized national statistics. In so holding, the Court stated:

> There is no requirement, however, that a statistical showing of disproportionate impact must always be based on analysis of the characteristics of actual applicants. See *Griggs v. Duke Power Co.*, 401 U.S., at 430. The application process might itself not adequately reflect the actual potential applicant pool, since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory. See *International Brotherhood of Teamsters v. United States*, ____ U.S. ____, ____ ____ ____. A potential applicant could easily measure her height and weight and conclude that to make an application would be futile. (*Id.*)

dents to challenge the restrictive union label requirements.[9] *Ballerina Pen Co. v. Kunzig*, 433 F.2d 1204 (D.C. Cir. 1970); *Master Printers Ass'n. v. Board of Trustees of Junior College Dist. No. 508, City of Chicago and State of Illinois*, 356 F. Supp. 1355 (N.D. Ill. 1973). *See also Hayes Int'l Corp. v. McLucas*, 509 F.2d 247 (5th Cir. 1975), *cert. denied*, 423 U.S. 864; *Merriam v. Kunzig*, 476 F.2d 1233 (3d Cir. 1973), *cert. denied*, 414 U.S. 911.

The contention advanced by the Intervenors that none of the Respondents have the capability to perform any City printing work is totally unsupported by the record. As stated earlier, Mr. Blank, the only witness fully knowledgeable with respect to the City's printing requirements, testified that most of the City's projects involved simple and uncomplicated printing techniques of a very routine nature (156a). Moreover, each of the Respondents stated that they were capable of performing most of the projects commissioned by the City and substantiated their claims by reference to similar projects which they have performed for clients in private industry (109a, 135a, 142a).[10] The listing of the representative clients of each Respondent further confirms their capability of producing work of the same nature and quality as required by the City.[11]

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[9]Judge MacMahon, in ruling on Appellants' pretrial motion to dismiss Image Carrier Corporation, rejected Appellants' standing argument on the basis that the City's policy arguably inflicts a real and judicially recognizable injury to the Respondents. (69a, 74a, fn. 12) Appellants did not thereafter attack the standing of the Respondents in the amended complaint and likewise raised no question of standing at the trial proceeding below.

[10]Indeed, Mr. Blank testified that he has personally inspected Associated Litho and Lettering and was able to state that Associated was capable of performing most of the projects required by the City (165a, 166a).

[11]The Intervenors would rely upon the non-expert testimony (124a) of Mr. C.C. Altomari, Deputy Commissioner of the City's Department of

(continued)

In short, the record below amply demonstrates that Respondents have suffered and continue to suffer real and tangible injury as a result of the City's enforcement of the union label policy.[12] Respondents have the capability to perform the work in question and, but for the City's exclusionary rule, they would have had the opportunity to bid on and be awarded City contracts which have a direct and ascertainable monetary value. It is obvious that elimination of this arbitrary and discriminatory policy would directly benefit Respondents by removing the barrier that has heretofore prevented them from bidding on City printing projects. Such relief, i.e., providing Respondents an equal opportunity with other printing establishments in the City of New York to perform City work, constitutes precisely the type of remedy which justifies judicial intervention.

II. THE COURT BELOW, PER JUDGE MacMAHON, WAS CORRECT IN CONCLUDING THAT APPELLANTS' RESTRICTIVE BIDDING AND CONTRACT AWARDING PRACTICES WERE ARBITRARY AND IRRATIONAL AND NOT REASONABLY RELATED TO ANY LEGITIMATE GOVERNMENTAL PURPOSE.

From the record below, it is apparent that the Respondents have overcome the presumption of validity afforded

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[11](continued)
Purchase, for the factual finding that the Respondents lack a sufficient number of employees to successfully complete any City printing contracts without brokering out City contract work (124a). There is no Regulation that limits City printing to firms having a specified minimum number of employees. Not even Mr. Altomari contends Respondents are incapable of performing many of the printing jobs required by the City. Yet, the City's blanket policy would exclude Respondents from bidding on all such City projects, regardless of how small or how simple they might be.

[12]It should be noted that Appellants' discriminatory policy is still in full force and effect and continues to inflict hardship on Respondents. On April 20, 1977, Judge MacMahon, as part of his order declaring Appellants' practices unconstitutional, agreed to issue a stay of the injunctive relief pending this appeal (103a).

all local police power measures by demonstrating that Appellants' policy of restricting the awarding of City printing contracts to only union printers is devoid of logic, and totally lacking in any rational relationship to legally justifiable City policy. Judge MacMahon was, therefore, correct in finding New York City's policy of rejecting bids on public printing contracts solely on the basis of open-shop status of the bidder patently arbitrary and irrational and, consequently, in violation of Respondents' rights as guaranteed by 42 U.S.C. 1983.

III. THE NUMEROUS POST-HOC JUSTIFICATIONS OFFERED BY THE APPELLANTS AS RATIONALE FOR THE RESTRICTIVE UNION LABEL POLICY ARE UTTERLY TRANSPARENT, UNSUPPORTED BY THE RECORD, AND WERE CORRECTLY REJECTED BY JUDGE MacMAHON IN HIS DECISION BELOW.

A. Nothing in the record establishes that Respondents were precluded from bidding on City printing contracts because of their failure to meet prevailing wage criteria.

The Appellants, in their arguments to this Court, display an almost fanatical compulsion to present this case as a prevailing rate case, concerned solely with the question of whether or not New York City has the right to enforce those sections of the New York State Labor Law dealing with "prevailing wage rates". This presentation completely distorts the real issue before the Court; that is, whether the City can arbitrarily preclude open shop printing companies in the City of New York from bidding on and being awarded City printing projects financed with New York taxpayer monies solely because of their status as open shop printers.

Respondent's complaint attacked the City's union label policy enunciated in Mayor LaGuardia's Order and im-

plemented and enforced through Appellants' bid solicitation restrictions. Nowhere in these bid solicitations is prevailing wage mentioned nor is there any indication that employers who successfully bid must pay prevailing wage rates.

Union status is not the litmus test of whether an individual printer is paying his employees the "prevailing rate", however that term is defined. As the record below indicates, open shop printing companies in New York often pay rates comparable with those of union shops.[13] Indeed, as the record further reflects, New York State has a prevailing rate law, a Regulation separate and distinct from the union label policy which the City is here attempting to defend. The record below evidences no attempt by either the City or the State to preclude Respondents from bidding on City contracts because of their failure to meet any prevailing wage criteria. Respondents were prohibited from bidding on State work solely due to their status as open shop, non-union printers, regardless of their wage and benefit schedules. Respondents were not and have not been deterred from bidding by prerequisites of prevailing wage criteria, but strictly due to the explicit union label requirement which Respondents could not meet.

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[13]No evidence was introduced below nor was an effort made to explain how prevailing rates are established when various union contracts establish different pay grades for the same job classification. Nor was it explained why, under such circumstances, compliance with the union label requirement should *ipso facto* obviate the prevailing rate rationale.

B. Judge MacMahon's decision below is in accordance with other Federal and State Court decisions which have focused on the legal infirmities inherent in restricting the award of public contracts to unionized firms.

The issues raised in this case have received a great deal of attention from both Federal and State courts. By the overwhelming weight of authority, the restricting of public contract bidding to unionized firms is illegal. *Master Printers Association, supra;* McQuillen, *The Law of Municipal Corporations,* Vol. 10, 3rd ed. §29.48.

Prior to the decision below, the leading Federal court opinion on this subject was *Master Printers Association, supra,* a case strikingly similar to the instant case, in which the Court held that the union label prerequisite imposed by the City of Chicago for certain of its public printing contracts was unconstitutional. In the court's final order, Judge Marowitz held, "the practice of public bodies in limiting bidding and the awarding of public contracts to union contractors is violative of the United States Constitution and public policy."

The lack of any justifiable rationale for distinguishing between an open shop and a unionized employer's shop in the awarding of public contracts was likewise recognized in *Anthony P. Miller, Inc. v. Wilmington Housing Authority,* 165 F. Supp. 275 (D. Del. 1958). In this case, the plaintiff asserted that the City of Wilmington had the duty to let contracts solely to union labor in order to insure tranquility among various contractors working on the job. The court responded that such a policy would be in violation of public policy and found:

> By the full weight of authority, a municipal corporation cannot discriminate in favor of organized labor.

The Court also concluded that a local government has the duty to deal fairly with all its citizens:

> Government exists for the benefit of all. All are required to pay for the benefits of government, and finally, government has responsibility to all of the inhabitants alike. These appear to be the three main reasons assigned by the cases for almost uniformly holding invalid statutes directing the employment of union labor in connection with public works contracts.

As indicated in *Master Printers Association, supra,* there is a considerable body of state court case law holding union label policies on the part of municipalities unconstitutional. *Master Printers Association v. Board of Trustees, supra; Modern and Continental Construction Co., Inc. v. Massachusetts Port Authority,* ____ Mass. ____, 343 N.E.2d 362 (1976); *Long Island Signal Corp. v. County of Nassau,* 51 Misc. 2d 320, 273 N.Y.S.2d 188 (1966), *Upchurch v. Adelberger,* 231 Ark. 682, 332 S.W.2d 242 (1960); *Keyes Electrical Service v. Board of Chosen Freeholders,* 15 N.J. 178, 83 A.2d 61 (1951); *State ex rel. United District Heating, Inc. v. State Office Building Commission,* 124 Ohio St. 413, 179 N.E. 138, 125 Ohio St. 301, 181 NE.E 129 (1932); *Wright v. Hoctor,* 95 Neb. 342, 145 N.W. 704, 146 N.W. 997 (1914); *Miller v. City of Des Moines,* 143 Iowa 409, 122 N.W. 226 (1909); *People ex rel John Single Paper Company v. Edgcomb,* 112 A.D. 604, 98 NYS 965 (1906); *Fiske v. People ex rel. Raymond,* 118 Ill. 206, 58 N.E. 985 (1900); *Adams v. Brenan,* 177 Ill. 191, 52 N.E. 314 (1889).

Additionally, numerous courts have held that to restrict the award of public contracts to unionized firms creates a monopoly among those firms. Such practices have been found to violate the principles of competitive bidding, and are repugnant to sound fiscal public policy. *Upchurch v. Adelsberger, supra; Mugford v. Mayor and City Council of*

Baltimore, 185 Md 266, 44 A.2d 745 (1946); *Miller v. City of Des Moines, supra; State v. City of Patterson, New Jersey*, 66 NJ 129, 42 A. 589 (1901); *City of Atlanta v. Stein*, 111 Ga. 789, 36 S.E. 932 (1900); *Adams v. Brenan, supra.*

C. The record below fully supports Judge MacMahon's decision.

In holding Appellants' restrictive contracting policies unconstitutional, Judge MacMahon placed his reasoning squarely in line with the considerable body of law which holds that where a local government exercises its police power in such a way as to construct classifications of persons, such classifications must be reasonable, not arbitrary, and have a fair and substantial relation to a legitimate government objective. *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920); *Reed v. Reed*, 404 U.S. 71, 75-76 (1971); *Eisenstadt v. Baird*, 405 U.S. 438, 446-447 (1972).

Judge MacMahon had before him ample evidence upon which to justifiably conclude that Appellants' union label policy was violative of 42 U.S.C. 1983. The record is replete with testimony which clearly establishes the irrationality of the Appellants' restrictive bidding policy. As previously noted, the Respondents have the capabilities to perform the type of printing jobs which the City presently restricts to unionized printers (109a, 135a, 145a, 166a)[14]. Further, representatives of each Respondent testified that their companies routinely perform similar work for both private and public sector clients (109a, 135a, 142a). This evidence forcibly demonstrates the arbitrariness of the City's differentiation between union and non-union print-

[14]This testimony is buttressed by the statements of Mr. Ed Blank, the only expert witness to testify in the case. (See discussion of Mr. Blank's testimony *supra*, pp. 5-6).

ing firms and substantiates that this policy is totally unrelated to any legitimate articulated state purpose and, therefore, in violation of the equal protection clause. *McGinnis v. Royster*, 410 U.S. 263, 270, 93 S.Ct. 1055, 1059, 35 L.Ed. 2d 282, 289 (1973).

New York City's union label policy was not the end product of the legislative process, with its inherent safeguards against undue and unusual influence of any one political, economic, or social sector, but rather was authored by a small group of executive office holders. The Resolution of 1934 was unaccompanied by any fact findings or studies which tended to indicate that citizens of New York City employed in the printing industry would benefit by a requirement that all City printing work let to private employers be awarded to only union printers. In fact, the actual effect of the policy has, quite predictably, worked to the disadvantage of a large segment of the City's printing industry and its employees by assuring that the award of City printing contracts is restricted to a dwindling minority of unionized printing firms and their employees (150a).

The discrimination occasioned by Appellants' restrictive union label policy is as defenseless as the arbitrary legislative dichotomy struck down by the Supreme Court in *Hartford Co. v. Harrison*, 301 U.S. 459, 462, 57 S.Ct. 838, 840, 81 L.Ed. 1223, 1226 (1937). In *Hartford*, the Court was called upon to examine the constitutionality of a Georgia statute which forbade the licensing of salaried employees of stock insurance companies as agents to sell life insurance but permitted the licensing of salaried employees of mutual insurance companies. In invalidating what was deemed to be an arbitrary distinction, the Court found that no legitimate state purpose was served in distinguishing between the two types of insurance companies and then went on to conclude that in order to satisfy the equal protection clause, distinctions in the treatment of business entities engaged in the same business activities must have a

rational relation to some genuinely different characteristics of the business involved.[15]

Similarly, in *Rayco Construction, Inc. v. Vorsanger*, 397 F.Supp. 1105 (E.D.Ark. 1975), the District Court was asked to evaluate the constitutional propriety of granting a bid award preference for public construction contracts to those companies which had successfully completed prior public construction contracts. No such preference was given to a bidder who had successfully completed private construction contracts. Finding the distinction between satisfactory performance of public contracts as opposed to private contracts an artificial one, not reasonably related to furthering the state's interest in assuring the successful completion of its construction projects, the Court invalidated the disparate treatment fostered by the administrative regulation.

Evening assuming, *arguendo*, that the union label policy was constitutionally valid at the time of its adoption, it is clear from the record that, today, the dichotomy between union and non-union status with respect to the award of public contracts is ill-suited to any conceivable legitimate governmental purpose. Such a distinction in light of the present nature of the printing industry in the City of New York is totally arbitrary and capricious in its application.[16] A police power measure, although constitutionally valid when made, may become arbitrary and, therefore, un-

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[15]That the Appellants' restrictive practices are totally arbitrary and without rational basis is further exemplified by the fact that no non-union printer has ever been inspected by any of the Appellant Agencies (124a). Indeed, only two or three percent of union printers have ever been inspected. Obviously, rarely having inspected the city's open shop printers, appellants are in no position to adjudge whether there are inherent differences between union and non-union printing establishments warranting the discriminatory policy here under attack.

[16]See Mr. Blank's descriptions of present industry conditions in the City of New York. (154-61a, 166-67a)

constitutional by operation of later events. *Abie State Bank v. Bryan*, 282, U.S. 765, 772, 51 S.Ct. 252, 255, 75 L.Ed. 690, 701 (1931); *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133, 162, 51 S.Ct. 65, 75 L.Ed. 255, 270 (1930).

The sole purpose articulated in the resolution adopting the New York City union label policy on April 21, 1934, was:

> [T]o lend the greatest measure of aid and assistance during the *present economic depression* to those citizens of our City engaged in the various branches of the printing industry . . . . (Emphasis added)

The resolution indicates plainly that its purpose was limited to the duration of the Great Depression of the 1930's. Today, the union label policy employed by New York City clearly bears no rational relation to the purpose of aiding printing workers facing the economic conditions existent on April 12, 1934. Those conditions, at present, quite simply do not exist.

Unless this Court strikes down the patently discriminatory policies arising out of Mayor LaGuardia's antiquated Order, the majority of New York City's printing establishments will continue to be foreclosed from successfully bidding upon City printing work. Such a prohibition will not only harm the growing number of non-union City printing companies, but will also inure to the detriment of the City's taxpayers, who will be forced to shoulder the additional tax burden resulting from the City's failure to apply the principles of competitive bidding to these contracts.

IV. THE RECORD DOES NOT DEMONSTRATE THE EXISTENCE OF SUCH A COMPELLING INTEREST AS TO JUSTIFY THE INFRINGEMENT OF RESPONDENTS' FUNDAMENTAL RIGHT TO ENGAGE IN A LAWFUL OCCUPATION.

The right to work for a living by engaging in occupations common to the community is the very essence of the personal freedom which the Fourteenth Amendment was designed to secure. *Truax v. Raich*, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131 (1915); *Hanson v. Unified School District No. 500, Wyandotte City, Kansas*, 364 F.Supp. 330 (D.Kan.1973). The City's policy of arbitrarily restricting the award of printing contracts to unionized printing establishments intereferes with the full exercise of this constitutionally protected right by conditioning the right to employment solely on the basis of union affiliation.

Once an exercise of the police power has been shown to interfere with a fundamental right, the governmental entity has the burden of proving that a compelling state interest is furthered by the measure in order to sustain its constitutional validity. *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969). Clearly, the record is void of any such showing. Further, governmental restriction of fundamental rights mandates that a governmental entity exercise its police power in the least restrictive manner possible. *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972); *Shelton v. Tucker*, 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231 (1960). Obviously, the City in creating the discriminatory dichotomy here challenged, has not properly circumscribed the impact of the police power but has in fact classified its citizens employed in the printing industry into two classes, denying one of them the fundamental right to earn a livelihood without acquiring union representation.

V. FEDERAL LAW PRE-EMPTS THE PRACTICES OF APPELLANTS REQUIRING THAT CONTRACTS BE AWARDED ONLY TO COMPANIES ABLE TO EXHIBIT THE UNION LABEL.

With the adoption of the National Labor Relations Act, Congress regulated and occupied the substantive area of labor relations "to the full extent of its constitutional power under the Commerce Clause" *Amalgamated Assoc. of Street Employees v. Wisconsin Employment Relations Board*, 340 U.S. 383, 391, 71 S.Ct. 359, 363, 95 L.Ed. 364, 373-374 (1950). As such, the Federal labor policy set forth in the National Labor Relations Act pre-empts and voids action by local governmental bodies which contravene these policies. The pre-emption doctrine, as enunciated by both National Labor Relations Board and Court decisions, is designed to avoid competing regulation of labor relations matters by state and local governmental bodies which undermine the policies embodied in federal labor laws. Indeed, the preamble to the National Labor Relations Act makes this clear:

> ". . . The perceived incapacity of common law courts and state legislatures, acting alone, to provide an informed and coherent basis for stabilizing labor relations conflict and for equitably and delicately structuring *the balance of power among competing forces* so as to further the common good." *Amalgamated Association of Street Employees v. Lockridge*, 403 U.S. 274, 286, 91 S.Ct. 1909, 1917-18, 29 L.Ed.2d 473, 482-483 (1971). *See also Connell Construction Company v. Plumbers and Steamfitters Local 100*, 421 U.S. 616, 95 S.Ct. 1830, 44 L.Ed 2d 418 (1975); *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin*, 418 U.S. 264, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974); *Beasley v. Foodfair, Inc.*, 416 U.S. 653, 94 S.Ct. 2023, 40 L.Ed.2d 443 (1974).

The purpose of the Act is to prevent the states from establishing diverse rules of law which are contrary to federal labor policy and which are likely to result in a variety of local procedures and attitudes toward labor controversies. *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 137 (1971); *Garner v. Teamsters Union*, 346 U.S. 485, 490 (1953). In addition, the Act specifically protects some activities, prohibits some practices and leaves others to be controlled by the free play of economic forces. *NLRB v. Nash-Finch Co., supra; see Machinists and Aerospace Workers v. WERC*, 427 U.S. 132 (1976); *American Ship Building Company v. NLRB*, 380 U.S. 300 (1965); *Grinnell Corp. v. Hackett*, 475 F.2d 449 (1st Cir. 1972), *cert. denied*, 414 U.S. 879 (1973).

A state law or regulation need not be directed specifically at an expressly protected activity or directly impact upon the expressed rights in order to be pre-empted. Indeed, statutes which only indirectly impact upon rights guaranteed by the statute or which inhibits rights implicitly protected by Section 7 have been held to be pre-empted by the Federal labor statute. *Machinists and Aerospace Workers v. WERC, supra, Hawaiian Telephone v. State of Hawaii, Dept. of L. & I. Rel.*, 405 F.Supp. 275 (D. Hawaii 1975).

The restrictive bidding and contract award practices utilized by the Appellants directly conflict with those rights guaranteed by Section 7 of the National Labor Relations Act. Section 7 of the National Labor Relations Act, in relevant part, specifically provides:

> Employees . . . shall also have the right *to refrain from any or all such activities* except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 158(a)(3) of this title. (Emphasis added)

Consistent with the express policy and rights covered by the NLRA is the proposition that under federal law employees have the right to refrain from union affiliation or union organizations:

> ". . . the employee has indeed an unfettered right to abstain from indulging in union activity. He need not 'form, join, or assist' a labor organization and again, an agreement apart, this inactivity cannot be the source of recriminations. It is by now too clear for citation that this facet of Section 7 was designed to prevent forcing the unwilling worker into a union." *NLRB v. International Union, etc.*, 320 F.2d 12, 15 (1st Cir. 1963); *see. Clarks Gamble Corp. v. NLRB*, 422 F.2d 845, 847 (6th Cir. 1970), *cert. denied*, 400 U.S. 868; *American Bread Company v. NLRB*, 411 F.2d 147 (6th Cir. 1969); *NLRB v. Gilmore Industries, Inc.*, 341 F.2d 240, 241 (6th Cir. 1965); *Kansas City Power & Light v. NLRB*, 137 F.2d 77, 83 (8th Cir. 1943); *DeBardeleben, et al. v. NLRB*, 135 F.2d 13, 15 (5th Cir. 1943).

It is conceded by the Appellants that the award of most City printing contracts is restricted to only those companies who are authorized to affix the union label. The Respondents and their employees who have chosen not to join or be represented by a labor organization, are by application of the City's policy denied the opportunity to bid on projects financed by public tax money, solely because of their exercise of the aforementioned federally protected rights. Thus, the City's policy directly inhibits these printing employees from exercising their federally protected rights by depriving them and their employees from the opportunity to perform work on city projects. In effect, New York City is saying to their employees, "if you exercise your federally protected right to refrain from union representation, the city will penalize you by depriving you of the right to perform city contracts."

The actual effect of these arbitrary restrictive practices is clear. Respondents and their employees are forced to unionize to the deprivation of their employees' federally protected Section 7 rights if they desire to obtain the economic benefit of being able to perform city printing contracts. In essence, the City is penalizing the employees of non-union employers for exercising the rights conferred on them by federal law. Such policies, when they undermine federal labor policy, have consistently been struck down as pre-empted by the federal regulatory scheme. *Hawaiian Telephone v. State of Hawaii, Department of L. & I. Rel., supra; San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959); *Motor Coach Employees v. Lockridge, supra.*

The Appellants' union label policy also infringes upon the employee's right of choosing his or her own bargaining representative. Representation by any union will not suffice to comply with 1934 Mayoral Order. Under paragraph 1 of the Order, an employee must not only be represented by a labor organization but a labor organization which itself is a member of the Allied Printing Trades Council of the City of New York so that his or her employer can display that organization's label. Such an infringement of an employee's ability to freely associate with a union of his or her own choosing undermines the Section 7 guarantee that all employees have the right to "full freedom of association, self organization, and designation of representatives of their own choosing."

The Appellant's union label policy clearly conflicts with federal labor law. As the Court stated in *Machinist and Aerospace Workers, supra;*

> When it is clear, or may fairly be assumed that the activities which a State purports to regulate are protected by Section 7 of the National Labor Relations Act . . . , due regard for the federal enactment requires that state jurisdictions must yield. *To leave the States free to regulate conduct*

so plainly within the central aim of federal regulations involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. (Emphasis added) *Machinist and Aerospace Workers, supra* at 139, citing *Garmon, supra* at 244-47.

CONCLUSION

For all of the reasons set forth above, this Court should affirm the Decision of the District Court below and grant Respondents a declaratory judgment ordering that the policies and practices of the Appellants are illegal as violative of the equal protection clause of the Fourteenth Amendment and issue a permanent injunction against the City of New York barring them from implementing and enforcing the aforesaid policy.

Respectfully submitted,

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Dated: Washington, D.C.
July 20, 1977

Copy Received
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